1796.

GERMAN *verſus* WAINWRIGHT.

AT the laſt term a *non pros.* had been entered by conſent, on a preſumption, that, at the preceding term, a rule to try or *non pros.* had been obtained. On examining the record, however, no ſuch rule was entered; and now *Thomas* and *E. Tilghman* objected to take off the *non pros*, notwithſtanding the miſtake, unleſs the plaintiff was put on the ſame footing, as if the miſtake had not happened, by entering a rule to try or *non pros.* as of the laſt term, ſo that it might operate at the preſent term, ſhould the trial be poſtponed by the plaintiff's *laches*. *Lewis*, for the plaintiff, ſaid he thought the propoſition reaſonable; and the rule was entered accordingly, by order of the Court.

December Term, 1796.

BOUDINOT, *et. al.* Executors *verſus* BRADFORD.*

THIS was a feigned iſſue, directed by the Regiſter, &c. of *Philadelphia*, to try, whether a Will dated the 27th *April* 1788, and republiſhed on the 18th of *October* enſuing, in which the plaintiffs were named executors, was the laſt will of *Wm. Bradford*, Eſquire, the deceaſed brother of the defendant, who claimed as in a caſe of inteſtacy. In the courſe of the trial, the following points were ruled.

I. The execution of the Will having been proved, the *defendant's* counſel offered *Dr. Ruſh* as a witneſs, to teſtify, that the deceaſed, during his laſt illneſs, had ſaid, that he had deſtroyed his will; and that meaning to die inteſtate, he had ſigned Promiſſory Notes, in favor of ſome of the members of his family, for whom he wiſhed to make a particular proviſion. It

* There was a ſpecial ſitting of the Court after *December* Term 1796, from the 2d to the 5th of *January* 1797, for the trial of this cauſe.

It was, likewiſe, ſtated, that the defendant intended further to ſhew, that long ſubſequent to the Will in queſtion (which it was ſuggeſted had been forgotten) the defendant had made and deſtroyed another will, while in the perfect poſſeſſion of his reaſon; ſo that his declarations had become important, to manifeſt, whether, by deſtroying the ſecond will, he intended to revive the firſt, or to die inteſtate. 1796.

The counſel *for the plaintiff* objected to the admiſſion of the evidence propoſed; and relied upon the *6th ſection* of the act of Aſſembly (1 *vol. Dall. Edit. p.* 55) which declares, "that no Will in writing, concerning any goods and chattels, or perſonal eſtate, ſhall be repealed, nor ſhall any clauſe, deviſe, or bequeſt therein, be altered, or changed, *by any words, or will, by word of mouth only, except the ſame be, in the life time of the teſtator, committed to writing, and, after the writing thereof, read unto the teſtator, and allowed by him, and proved to be ſo done by two or more witneſſes.*" It is attempted, however, to annul a Will regularly proved, and long preſerved, without any one formality, that the law preſcribes, or common prudence, in relation to ſo important a concern, would naturally exact. 1 *Dall. Rep.* 278.

For *the defendant*, it was anſwered, that whether the act of cancelling the ſecond will revived the firſt Will, or not, was the queſtion to be decided; and muſt depend on the declaration of the party. The evidence offered, reſpects only the deſign of cancelling the ſecond Will; which was an act, that might be equivocal in itſelf, but was capable of being rendered definite in its object, by a cotemporaneous explanation.

BY THE COURT: Whether *Mr. Bradford* made a ſecond Will, and afterwards cancelled it, are matters of fact, to be ſubſtantially and ſatisfactorily proved to the Jury. Being ſo proved, another object is contemplated, which, likewiſe, aſſumes the nature of a fact, whether by cancelling the ſecond Will, the deceaſed meant to revive the former inſtrument, or to die inteſtate; and we are at a loſs to conceive how ſuch a meaning (which it is unreaſonable to expect to find in writing) ſhould be aſcertained, but by the teſtimony of witneſſes. The evidence, indeed, will not go directly to deſtroy an exiſting Will, but, merely to ſhew, in effect, that the deceaſed did not intend again to make, or re-eſtabliſh, a Will, which he had once actually deſtroyed. The ſame point aroſe in *Lawſon v. Morriſon*, and was decided in the ſame way by the High Court of Errors and Appeals.*

Let the witneſs be qualified.

II. The doctrine of expreſs and implied revocations of Wills, being much diſcuſſed during the trial, the CHIEF JUS-

* See *post*.

1796. TICE, with the concurrence of the other members of the Court, laid down the following poſitions.

M'KEAN, *Chief Juſtice.*—1ſt. Where a ſecond Will is made, containing an expreſs clauſe of revocation, the preceding Will, though not formally cancelled, is revoked.

2d. Where a ſecond Will is deſtroyed, *without more*, the preceding Will, not having been cancelled, is, generally ſpeaking, *ipſo facto* revived.

3d. Where a ſecond Will is cancelled, under circumſtances that manifeſt an intention either to revive, or not to revive, the preceding Will, thoſe circumſtances muſt be proved.

4th. The mere act of making a ſecond teſtament, is a revocation of a preceding teſtament, in relation to perſonal eſtate; the law throwing the perſonal eſtate on the executor as a truſtee.

III. It was ſuggeſted by *Ingerſoll*, that, in *England*, an executor is entitled in his own right to the *reſiduum* of perſonal eſtate, undiſpoſed of by the Will; whereas in *Pennſylvania*, the executor holds it only as truſtee for the next of kin.

But, BY THE COURT: There is no ſuch diſtinction to be found in any Act of Aſſembly, or judicial determination. The next of kin are only entitled to perſonal eſtate, in the caſe of inteſtacy; and a man cannot be inteſtate, who has made an Executor.

The principal point in the cauſe turned upon the ſtate of Mr. *Bradford*'s mind at the time of cancelling the ſecond Will and declaring his intention to die inteſtate; and the Jury being of opinion, from the evidence, that he was then in poſſeſſion of a competent underſtanding, found a

Verdict for the Defendant.

Ingerſoll & *R. Stockton* (of *New-Jerſey*) for the plaintiff. *Lewis*, *M. Levy*, & *Tod*, for the defendant.

GREENE'S, Caſe.

GEORGE GREENE, having petitioned for a diſcharge under the laws for the relief of inſolvent debtors, one of his creditors was offered as a witneſs to prove, that ſeveral judgments had been confeſſed by the petitioner, without a valuable conſideration, and with a view to defraud. It was objected, that a creditor was not a competent witneſs; as his teſtimony would go to invalidate the judgments, as well as to the impriſonment of the petitioner.

BY THE COURT:—This is a queſtion of fraud; and we can perceive no juſt reaſon, why a creditor ſhould not be examined to aſcertain whether, on that ground, the petitioner ought

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